

On Date 1, in Year 1, Decedent made separate gifts of \$A to or in trust for each of Decedent's a adult children. b of the gifts were made to Trust 1 and Trust 2, and the remaining c gifts were made outright to the Decedent's remaining c children. Year 1 is subsequent to December 31, 2000.

Child 1 has no children or more remote descendants. Child 2 has b children and d grandchildren.

Prior to Decedent's death, Decedent retained Law Firm in connection with Decedent's estate planning. Law Firm prepared and timely filed Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return, for Year 1, which reflects the gifts to each of Trust 1 and Trust 2, as well as the outright gifts to each of the Decedent's c other children. On Date 3, an amended Form 709 for Year 1 was filed to include gifts from a prior year that were inadvertently omitted from the original Year 1 Form 709.

Prior to the Year 1 transfers, Decedent had not used any of Decedent's GST exemption so that Decedent's entire GST exemption was available to Decedent at the time that such gifts were made. On the Year 1 Form 709, the return preparer inadvertently listed all a gifts, including the gifts to Trust 1 and Trust 2, on Part 1 of Schedule A. As a result, the gifts to Trust 1 and Trust 2 were not shown on Part 3 of Schedule A, where the option of making an election under § 2632(c) is provided in column (C). Thus, the preparer failed to check mark the box for the § 2632(c) election to apply, with the result that an election out of the automatic allocation of GST exemption was never made. Decedent died in the following year on Date 2. The failure to check the box for the § 2632(c) election to elect out of the automatic allocation was first discovered when preparing the Decedent's Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return.

It is represented that no additions have been made to Trust 1 or Trust 2 subsequent to the Decedent's gifts to each of them in Year 1. It is further represented that no taxable distribution, taxable termination or any other event has occurred with respect to Trust 1 or Trust 2 that would give rise to a generation-skipping transfer tax liability on the part of Trust 1 or Trust 2, or any of the beneficiaries of Trust 1 or Trust 2.

You are requesting an extension of time under § 301.9100-3 to elect, under § 2632(c)(5)(A), to have the automatic allocation of GST exemption not apply to transfers to Trust 1 and Trust 2 in Year 1.

Section 2601 imposes a tax on every generation-skipping transfer (GST). A GST is defined under § 2611(a) as (1) a taxable distribution, (2) a taxable termination, and (3) a direct skip.

Section 2602 provides that the amount of the tax is the taxable amount multiplied by the applicable rate. Section 2641(a) defines "applicable rate" as the product of the maximum federal estate tax rate and the inclusion ratio with respect to the transfer.

Under § 2642(a)(1), the inclusion ratio with respect to any property transferred in a generation-skipping transfer is defined as the excess of 1 over the "applicable fraction." The applicable fraction, as defined in § 2642(a)(2), is a fraction, the numerator of which is the amount of GST exemption allocated to the trust (or to property transferred in a direct skip), and the denominator of which is the value of the property transferred to the trust (or involved in the direct skip), reduced by the sum of certain taxes and charitable deductions.

Section 2631(a) provides that, for purposes of determining the inclusion ratio, every individual shall be allowed a GST exemption that may be allocated by such individual (or his executor) to any property with respect to which such individual is the transferor. Section 2631(b) provides that any allocation under § 2631(a), once made, shall be irrevocable.

Section 2632(c)(1), effective for transfers subject to the gift or estate tax after December 31, 2000, provides that if any individual makes an indirect skip during such individual's lifetime, any unused portion of such individual's GST exemption shall be allocated to the property transferred to the extent necessary to make the inclusion ratio for such property zero. If the amount of the indirect skip exceeds such unused portion, the entire unused portion shall be allocated to the property transferred.

Section 2632(c)(3)(A) provides that the term "indirect skip" means any transfer of property (other than a direct skip) subject to the gift tax made to a GST trust. Section 2632(c)(3)(B) provides, in part, that the term "GST trust" means a trust that could have a generation-skipping transfer with respect to the transferor unless the trust falls within any of six enumerated exceptions.

Section 2632(c)(5)(A)(i)(II) provides that an individual may elect to have this subsection not apply to any or all transfers made by such individual to a particular trust. Section 2632(c)(5)(B)(ii) provides that the election may be made on a timely filed gift tax return for the calendar year for which the election is to become effective.

Section 26.2632-1(b)(2)(iii)(A) of the Generation-Skipping Transfer Tax Regulations provides that a transferor may prevent the automatic allocation of GST exemption (elect out) with respect to any transfer or transfers constituting an indirect skip made to a trust.

Section 26.2632-1(b)(2)(iii)(B) provides the manner for making an election out. To elect out, the transferor must attach a statement (election out statement) to a Form 709. The election out statement must identify the trust, and specifically must provide

that the transferor is electing out of the automatic allocation of GST exemption with respect to the described transfer or transfers. Further, unless the election out is made for all transfers made to the trust in the current year and/or in all future years, the current-year transfers and/or future transfers to which the election out is to apply must be specifically described or otherwise identified in the election out statement.

Section 26.2632-1(b)(2)(iii)(C) provides that the Form 709 with the attached election out statement must be filed on or before the due date for timely filing of the Form 709 for the calendar year in which the first transfer to be covered by the election out was made.

Section 2642(g)(1)(A) provides, in relevant part, that the Secretary shall by regulation prescribe such circumstances and procedures under which extensions of time will be granted to make an election out under section 2632(c)(5). Such regulations shall include procedures for requesting comparable relief with respect to transfers made before the date of the enactment of § 2642(g)(1), which was enacted into law on June 7, 2001.

Section 2642(g)(1)(B) provides that in determining whether to grant relief under this paragraph, the Secretary shall take into account all relevant circumstances, including evidence of intent contained in the trust instrument or instrument of transfer and such other factors as the Secretary deems relevant. For purposes of determining whether to grant relief, the time for making the allocation (or election) shall be treated as if not expressly prescribed by statute.

Notice 2001-50, 2001-2 C.B. 189, provides, in part, that under § 2642(g)(1)(B), the time for electing out of the automatic allocation rules is to be treated as if not expressly prescribed by statute. The Notice further provides that taxpayers may seek an extension of time to make an election described in § 2632(c)(5) under the provisions of § 301.9100-3.

Section 301.9100-1(c) provides that the Commissioner has discretion to grant a reasonable extension of time under the rules set forth in §§ 301.9100-2 and 301.9100-3 to make a regulatory election, or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

Section 301.9100-3 provides the standards used to determine whether to grant an extension of time to make an election whose due date is prescribed by a regulation (and not expressly provided by statute). Under § 301.9100-1(b), a regulatory election includes an election whose due date is prescribed by a notice published in the Internal Revenue Bulletin. In accordance with § 2642(g)(1)(B) and Notice 2001-50, taxpayers may seek an extension of time to make an allocation described in § 2632(c)(5) under

the provisions of § 301.9100-3.

Requests for relief under § 301.9100-3 will be granted when the taxpayer provides the evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the government.

Section 301.9100-3(b)(1)(v) provides that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election.

We conclude that the requirements of § 301.9100-3 have been satisfied. Therefore, an extension of time of 60 days from the date of this letter is granted to make the election out of the automatic allocation of GST under § 2632(c)(5)(A)(i)(II) for the transfers to Trust 1 and Trust 2 in Year 1.

The election should be made on Supplemental Forms 709 filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to the Form 709. A copy is enclosed for this purpose.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

William P. O'Shea
Associate Chief Counsel
(Passthroughs & Special Industries)

Enclosures (2)
Copy for § 6110 purposes
Copy of this letter